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No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

JERROLD ZIMAN and ELLEN ZIMAN,
Petitioners,

v.

THE STATE OF NEW YORK and the
NEW YORK STATE DIVISION OF
HOUSING AND COMMUNITY RENEWAL,
Respondents.

and

JERROLD ZIMAN and ELLEN ZIMAN,
Petitioners,

v.

THE STATE OF NEW YORK,
Respondent.

Petition for a Writ of Certiorari to the New York State Court of Appeals

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In 1984 Jerrold and Ellen Ziman purchased a small Greenwich Village brownstone in New York City, intending to restore it into a single-family home for themselves and their two children. The building contained three occupied rent-controlled units. Evictions of tenants in such units are severely restricted under the state rent control laws, but at that time a statutory exception allowed eviction if the building's owner sought to personally occupy the units. The Zimans promptly filed their eviction applications under this provision. However, five months after they bought their house a new state law was enacted that barred their owner-occupancy evictions.

In 1992, after more than seven years of legal battle, the Zimans finally succeeded in evicting their tenants on another ground—financial hardship. The following questions are presented:

1) Whether the Zimans' due process rights under the Fifth and Fourteenth Amendments of the United States Constitution were violated when they were prevented from rightfully evicting their tenants for a period of over seven years, due to the new state law and to the state housing agency's lengthy mishandling of their eviction applications.

2) Whether the Zimans suffered a taking of their property by New York State when they were illegally barred from evicting tenants from their intended home, especially given that both their right to evict and their financial hardship were eventually affirmed by the state's highest court.

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PETITION FOR A WRIT OF CERTIORARI

Jerrold and Ellen Ziman petition this Court for a writ of certiorari to review the ruling of the New York State Court of Appeals, which dismissed their appeal and left standing a lower court ruling denying their constitutional due process and takings claims.

DECISIONS BELOW

The first decision in this case was issued by the New York State Supreme Court in 1995 under the caption *Ziman v. Division of Housing and Community Renewal,*

No. 113700/93 (N.Y. County, Crane, J., May 10, 1995). The decision, which is unpublished, is set forth in the Appendix at 13a. A second lower court decision, also unpublished, was issued by the New York State Court of Claims in 1996. *Ziman v. State of New York*, Claim No 92736, App. 6a. These two decisions were consolidated on appeal by the New York State Appellate Division, which affirmed them in an opinion issued in 1997. App. 4a, 235 A.D.2d 369, 653 N.Y.S.2d 17 (1st Dept. 1997). The Appellate Division subsequently denied the Ziman's motion for leave to appeal to the state Court of Appeals. App. 2a. The Zimans then filed a similar motion with the latter court, which was also denied. App. 1a, 90 N.Y.2d 808 (1997).

JURISDICTION

The order of the New York State Court of Appeals denying the Zimans leave to appeal was issued on September 18, 1997. App. 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS AT ISSUE

The Fifth Amendment to the United States Constitution reads in relevant part:

> "No person . . . shall be deprived of life, liberty, or property without due process of law; nor shall private property be taken without just compensation."

The Fourteenth Amendment, Section 1, reads in relevant part: "[N]or shall any State deprive any person of life, liberty or property, without due process of law . . . ."

The state law which barred the owner-occupancy evictions sought by the Zimans is Chapter 234, Laws of 1984 (known as the Twenty Year Law), set forth in pertinent part at App. 22a. The state regulation dealing with owner-occupancy eviction 9 NYCRR § 2204.5(a), as altered by the 1984 state law, is set forth at App. 25a.

STATEMENT OF THE CASE

At issue in this case is the right of a family to make their house their home. When Jerrold and Ellen Ziman bought their Greenwich Village townhouse, New York State law permitted them to evict their rent-controlled tenants so that they and their children could fully occupy their house. Five months later, however, the law was amended to bar the very owner-occupancy evictions that the Zimans had counted on in buying their home.

The Zimans subsequently engaged in a lengthy and torturous series of legal battles to evict their tenants on other grounds. They filed eviction applications based on financial hardship with the State Division of Housing and Community Renewal (DHCR), which spent two years processing the applications before deciding to reject them. Its reasoning, that a landlord seeking owner-occupancy was automatically ineligible to claim financial hardship, was ultimately rejected by both the Appellate Division and the state Court of Appeals. Both of these courts ruled that the Zimans had clearly demonstrated hardship.

By the time the Zimans' last tenant finally left in 1992, under threat of forcible eviction, nearly eight years had passed since they had first bought their house. The Zimans then filed suit for damages against the State and DHCR. The Zimans argued that the huge delay in their ability to evict their tenants, which was triggered by the retroactive destruction of their owner-occupancy rights and which was then exacerbated by DHCR's mishandling of their applications, violated their due process rights and constituted a taking of their property. The state courts rejected both claims.

These rulings left the Zimans with no redress for a seven-year ordeal in which they were forced to act as landlords, under the sort of occupational duress which this Court has characterized as a constitutionally "startling innovation". *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263, 270 (1965). They received absolutely

no compensation for the huge delay that they endured in being able to exercise a landlord's "traditional right to evict a tenant in order to occupy a rental unit personally". *Fresh Pond Shopping Center, Inc. v. Callahan*, 464 U.S. 875, 876 (1983) (Rehnquist, J., dissenting from dismissal of appeal), *cited with approval* in *Yee v. City of Escondido*, 503 U.S. 519, 528 (1992). For others in their position in New York City, these rulings destroy the fundamental right to make one's house one's home. And for landlords living under rent control regimes elsewhere, these rulings undermine a basic property right.

A. Statement of Facts

In February, 1984, the Zimans bought a small, 200-year old townhouse in Greenwich Village, planning to restore it to its original condition as a single family home for themselves and their two young children. App. 14a; *see also Ziman v. DHCR*, 153 A.D.2d 489, 544 N.Y.S.2d 147 (1st Dept. 1989), (hereinafter "*Ziman I*"), *aff'd*, 76 N.Y.2d 721, 557 N.Y.S.2d 876 (1990).[1] At that time, the house had been divided into seven tiny apartments and contained three rent-controlled tenants. *Id.* The Zimans planned to use the owner-occupancy eviction provision of the rent control law to remove these tenants, so that their own family could fully occupy the house. They promptly filed eviction applications with DHCR on this ground. App. 14a.

The law at that time provided for eviction certificates to be issued when the

> "landlord seeks in good faith to recover possession . . . because of immediate and compelling necessity for his own personal use and occupancy or for [that] of his immediate family . . . ." N.Y.C. Admin. Code

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[1] As described at page 6 below, in *Ziman I* the petitioners succeeded in overturning DHCR's refusal to grant their hardship-based eviction applications. The *Ziman I* decisions are not before this Court for purposes of review, but do set forth background facts that this Court may find useful.

§ Y51-6.0(b)(1), subsequently recodified as 9 NYCRR § 2204.5; *see* App. 25a.

Five months after the Zimans bought their house, however, in July, 1984, the State amended this provision to prohibit owner-occupancy evictions of tenants who had lived in their buildings for more than 20 years. Ch. 234, Laws of 1984 (known as the Twenty Year Law); *see* App. 22a. This amendment took effect immediately upon passage. *Id.* at section 4. One of the Zimans' tenants qualified immediatetly under the 20-year criterion, and a second tenant qualified during the course of the subsequent proceedings. Their third tenant died in 1987, at which point the Zimans gained access to his apartment. App. 14a; *Ziman I*, 153 A.D.2d at 490, 544 N.Y.S.2d at 148.

The Zimans' eviction applications were thus blocked by the Twenty Year Law even though they had been filed months before the law's enactment.[2] The Zimans filed new eviction applications in August, 1984, based on their inability to make an 8 and ½ percent return on the assessed value of their property. App. 14a.

DHCR conducted two lengthy audits of the Zimans, both of which confirmed their inability to make this minimal return on their house. App. 14a. Despite these findings, two years later, in 1986, a DHCR administrative judge ruled that the Zimans could not utilize this hardship provision even though they met its criteria, because their motivation was not hardship but owner-occupancy. App. 14a.

In short, nearly two years after accepting the Zimans' hardship applications, and after subjecting them to two

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[2] Prior to its amendment, the owner-occupancy eviction law would still have required the Zimans to show an "immediate and compelling necessity". The Zimans had documented the unsafe conditions under which they were living in their owner-occupancy eviction applications. Appellate Division, Record on Appeal below 74-80. In their rulings below, both trial courts agreed that the new Twenty Year Law "prevented" the Zimans from obtaining their owner-occupancy eviction certificates. App. 7a; App. 14a.

extensive audits on whether they met fact-based criteria for financial hardship, DHCR rejected the applications on the basis of a threshold legal issue that could have been raised at the very outset of the proceeding.

The Zimans challenged DHCR's decision. It was upheld by a state trial court, but in 1989 the Appellate Division overturned that ruling, holding that the rent control law's hardship provision was available to the Zimans and that they met its criteria regardless of their intention to personally occupy the units. App. 15a; *Ziman I*, 153 A.D.2d 489, 544 N.Y.S.2d 148. The Appellate Division did not merely order DHCR to reconsider its decision; it affirmatively "directed [the agency] to issue the requested certificates of eviction", "since there is no question that petitioners meet the hardship requirements . . . ." 153 A.D.2d at 489, 491; 544 N.Y.S.2d at 148, 149.

Five years had now passed since the Zimans' filing of their hardship applications.

The Appellate Division ruling was upheld unanimously by the Court of Appeals in May, 1990. *Ziman I*, 76 N.Y.2d 721, 557 N.Y.S.2d 876. Like the Appellate Division, the Court of Appeals expressly noted that there was "unrefuted evidence of hardship" and that therefore the agency had been properly ordered to grant the Zimans' application. *Id.*

Despite this mandate, DHCR withheld the eviction certificates for over four months. As if to draw out the Zimans' ordeal as long as possible, DHCR insisted on waiting until the Court of Appeals denied a motion to reargue filed by the tenant-intervenors. App. 7a; Appellate Division, Record on Appeal below at 114-15, 176 (hereafter referred to as Record Below). By the time the eviction certificates were issued in October, 1990, more than six and one-half years had passed since the Zimans had first filed their eviction applications.

The Zimans now faced a three month waiting period before they could even begin court action to remove their

tenants. They won judgments of possession in July, 1991, and then had to wait another six months before they could execute their warrants of eviction. Their last tenant did not leave until January, 1992—nearly eight years after the Zimans had bought their house. App. 15a.

Throughout these eight years, the Zimans were forced to live in incredibly cramped and insecure conditions in their own home. For two years, their family of four was confined to a two-room apartment of 341 square feet. This consisted of a tiny bedroom for the children, and a second room that served as kitchen, dining room and living room for the family and as a bedroom for Jerrold and Ellen Ziman. Record Below 178. When the apartment of their deceased tenant became available, the Zima's nine year old son could finally move into his own bedroom, but this was on a different floor of the house, separated from the rest of the family by a public staircase and two locked doors. *Id.*

When the Zimans first bought their house in 1984, they legitimately planned to act as landlords only temporarily, while awaiting the approval of their eviction applications. Instead, they were forced to be landlords for nearly eight years. These were years of nightmarish concerns regarding security, lack of privacy, lack of sleep, and constant fears regarding what their children were being exposed to by the behavior of their tenants and of their tenants' stream of visitors. There were drug paraphernalia in the halls, loud parties, police visits, doors broken down, and a host of other ordeals that destroyed any possibility of normal family life. Record Below 178-81. There were countless groundless complaints and acts of vandalism from hostile tenants. *Id.* 180. There was constant stress and fear over the safety of both house and family, to the point that Jerrold Ziman had to change his profession to remain near the building. *Id.*

Nearly all of this was the result of two factors. The first was the Twenty Year Law's restriction of owner-

occupancy evictions, a restriction which barred the Zimans' original eviction applications despite their legitimate reliance on pre-existing law when they purchased their house. The second factor was DHCR's egregious mishandling of the Zimans' hardship applications. The end result was that for over seven years, the Zimans were unlawfully prevented from the full possession and enjoyment of their property.

B. The Litigation Below, And The Raising Of The Federal Issues

In 1993 the Zimans filed a complaint for declaratory judgment and damages in the Supreme Court, County of New York, against DHCR and the State of New York, alleging that the government actions described above constituted a taking of their property and a violation of their due process rights under both the New York State and federal constitutions. Record Below 42; the supreme court itself characterized the Zimans as claiming "takings of property under the State and Federal constitutions" and as seeking "a judgment that their right to due process of law was violated." App. 13a.

In 1995, on cross-motions for summary judgment, the supreme court ruled against the Zimans. It held that the New York Court of Claims had exclusive jurisdiction over their takings claims. App. 13a, 16a-19a. As for the Zimans' due process claim, the court ruled against them on the basis of two previous state court cases that had rejected challenges, on both state and federal constitutional grounds, to the Twenty Year Law: *Dawson v. Higgins*, 197 A.D. 127, 610 N.Y.S.2d 200 (1st Dept. 1994), *app. dismissed*, 83 N.Y.2d 996 (1994), *cert. denied*, 115 S.Ct. 724 (1995); *Sobel v. Higgins*, 188 A.D.2d 286, 590 N.Y.S.2d 883 (1st Dept. 1992), *app. dismissed*, 81 N.Y.2d 953, 597 N.Y.S.2d 938 (1993), *leave to app. denied*, 82 N.Y.2d 655, 602 N.Y.S.2d 804 (1993). App. 19a. The court noted that even though, in

the Zimans' case, the law "was passed *after* they purchased the property", they were still able to utilize another ground for eviction. App. 19a (emphasis in original). It characterized the rent control laws as falling within the government's police powers, having a "valid public purpose of preserving affordable housing and preventing the dislocation of lower income and moderate income tenants." *Id.*, quoting *Sobel*, 188 A.D.2d at 288, 590 N.Y.S.2d at 885.

The Zimans appealed the due process portion of the decision to the Appellate Division, and filed their takings claims with the Court of Claims, citing both New York and federal law in their motion for partial summary judgment.[3] In 1996 the Court of Claims granted the State's motion to dismiss, basing its ruling on two grounds: 1) the claim was untimely; and 2) the State had not waived its sovereign immunity to such takings claims. App. 6a.

The Zimans appealed this decision as well, and the two cases were consolidated. Once again, the federal issues of takings and due process were argued extensively in the briefs.[4] In early 1997 the Appellate Division issued a two-page opinion upholding both lower court rulings. App.

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[3] *See, e.g.*, Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Partial Summary Judgment 13-16 (section II: "Compensation for Temporary Takings Is Required Under Decisions Of The United States Supreme Court") (Jan. 30, 1996).

[4] *See, e.g.*, the following portions of the Appellate Division Brief for Plaintiffs-Appellants (Aug. 28, 1996): 5 ("it is beyond question that the Fifth Amendment to the United States Constitution bars any state claim of sovereign immunity in takings cases", *citing First English Evangelical Church v. County of Los Angeles*, 482 U.S. 304 (1987)); 25-27 (section III.C, "Compensation For Temporary Takings Is Required Under Decisions Of The United States Supreme Court); 28-31 (due process violation, *citing Southview Associates v. Bongartz*, 980 F.2d 84 (2d Cir. 1992) on substantive due process, and *Textile Workers Union v. Darlington*, 380 U.S. 263 (1965), and related cases on occupational freedom).

4a. It agreed with the Court of Claims that the takings claim was untimely; like that lower court, it too nonetheless addressed the merits of the takings claim, ruling that DHCR's

> "purported delay . . . in processing appellants' applications for hardship certificates of eviction necessitated by the passage of the Twenty Year Law did not effect an unconstitutional 'taking' of property since the law advanced a legitimate State interest and appellants were not denied an economically viable use of the property . . . ." App. 5a, *citing Dawson*, 197 A.D.2d 127, 610 N.Y.S.2d 200.

The court made no attempt to reconcile this holding with the apparently contrary rulings in *Ziman I* by both it and the Court of Appeals that the Zimans had shown "unrefuted evidence of hardship". 76 N.Y.2d at 727, 557 N.Y.S.2d at 876; 153 A.D.2d at 491, 544 N.Y.S.2d at 149.

On the due process issue, the Appellate Division stated only that there was no deprivation since both the actions and laws at issue "all bore a reasonable relationship to a valid public purpose." App. 5a.

The Zimans moved the Appellate Division for leave to appeal to the state Court of Appeals. Their motion was denied. App. 2a. They then filed a timely motion with the Court of Appeals for leave to appeal to that court.[5] On September 18, 1997, that motion was denied as well. App. 1a.

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[5] The motion papers briefed a number of recent takings decisions by the U.S. Supreme Court in support of plaintiffs' contention that "[b]oth federal and New York case law make it clear that compensation is required for both temporary and permanent" takings. Memorandum In Support Of Motion For Leave To Appeal 17 (July 1, 1997).

REASONS FOR GRANTING THE WRIT

I. IN FORCING THE ZIMANS TO ACT AS LANDLORDS FOR OVER SEVEN YEARS, NEW YORK VIOLATED THEIR DUE PROCESS RIGHTS OF LIBERTY AND OCCUPATIONAL FREEDOM, CONTRARY TO DECISIONS OF BOTH THIS COURT AND THE SECOND CIRCUIT COURT OF APPEALS

New York's enactment of the Twenty Year Law forced the Zimans to become unwilling landlords, unable to go out of business. For seven years, they had to comply with countless legal requirements for rental units, ranging from building code provisions to landlord liability rules—all in a profession in which they never intended to remain, in a house which they rightfully expected to turn into a home for their family. This forced imposition of an occupation, inflicted upon the Zimans after they had bought their house and based solely on the fortuitous characteristics of their tenants, violated their right to due process.[6]

The choice to enter or leave an occupation is among the most basic decisions that a person can make. It intimately affects everything from one's daily activities to the direction and nature of one's career. In the case of the Zimans, the impact of this forced landlordship on their personal lives, ranging from their loss of privacy to their daily fears over the security of their children, was extensively detailed in the record below. See page 7, above.

The right to make choices concerning one's occupation is clearly "implicit in the concept of ordered liberty" that

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[6] *See, e.g.*, R.C. Lawrence, *Bright Lines In The Big City: Seawall, Tenant Succession Rights, And The Jurisprudence of Takings*, 91 Colum. L. Rev. 609, 651-52 (1991) ("If the owner can avoid the servitude [of landlord duties and liabilities] only by giving up title to the property, then the owner is forced to choose between an involuntary servitude and an uncompensated taking."); K. Manheim, *Tenant Eviction Protection And The Takings Clause*, 1989 Wis. L. Rev. 925, 1000-08.

is central to individual freedom. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937). A requirement by the state that one remain in a specified occupation violates this liberty. In the Supreme Court's words, the

> "proposition that a single businessman cannot choose to go out of business if he wants to would represent such a startling innovation that it should not be entertained without the clearest manifestation of legislative intent or unequivocal judicial precedent." *Textile Workers Union v. Darlington Manufacturing Co,.* 380 U.S. at 270.

See, e.g., Frost & Frost Trucking Co. v. R.R. Commission, 271 U.S. 583 (1926) (state attempt to force common carrier status on private trucking firm violates due process). As one federal appeals court stated, "[t]here would be severe constitutional problems with a rule of law which required an entrepreneur to remain in business against his will." *Robinson v. Diamond Housing Corp.*, 463 F.2d 853, 867 (D.C. Cir. 1972).[7]

The Appellate Division disposed of this issue with a single sentence, declaring that the respondents' actions and laws "all bore a reasonable relationship to a valid public purpose." App. 5a. This analysis, however, totally ignored the proper framework for evaluating permit denials. The U.S. Court of Appeals for the Second Circuit has described how such claims are to be addressed:

> "In evaluating a landowner's claim that a denial of a permit for a regulated use of land offends the landowner's right to substantive due process under the 'arbitrary and capricious' government conduct theory, a court first asks whether 'an entitlement exists in

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[7] *See also Family Division of Trial Lawyers v. Moultrie*, 725 F.2d 695, 705 (D.C. Cir. 1984) ("Inability to avoid continued service is the essential ingredient of involuntary servitude."); *United States v. Mussry*, 726 F.2d 1448, 1454 n.6 (9th Cir. 1984) ("Even though a person may come to a job voluntarily, subsequent coerced service constitutes involuntary servitude.").

> what has been applied for . . . .'" *Southview Associates v. Bongartz*, 980 F.2d 84, 101 (2d Cir. 1992), (Oakes, Chief J., concurring), *quoting RRI Realty Corp. v. Southampton*, 870 F.2d 911, 917 (2d Cir.), *cert. denied*, 493 U.S. 893 (1989).

The Zimans obviously had a well-founded expectation that they would be able to pursue their evictions on the relatively simple ground of owner-occupancy. Even if one assumes the validity of the Twenty Year Law with respect to buildings purchased *after* its enactment, New York's after-the-fact destruction of that expectation raises serious constitutional issues. In the words of this Court:

> "[r]etroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions." *General Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992).

DHCR's mishandling of the Zimans' eviction applications raises similar issues, which cannot be dismissed by vague reference to some valid public purpose. As described at pages 5-6 above, after the Zimans had spent two years undergoing two administrative audits by DHCR on the issue of hardship, an agency judge disallowed their applications on the basis of a threshold issue that should have been raised when those applications were first filed—namely, that their intention to personally occupy the house they owned somehow disqualified them from seeking hardship status. Even worse, once the state's highest court had affirmed the order directing DHCR to issue the eviction certificates, the agency still delayed doing so for four months. As petitioners argued to the Appellate Division, "four months [of DHCR's] delay are due more to malice than to mistake." Appellate Division, Reply Brief for Plaintiffs at 9 n.3.

The U.S. Court of Appeals for the Second Circuit has made it clear that due process is not satisfied by proce-

dural safeguards alone; it also entails protection from arbitrary and capricious action. The "issue of whether substantive due process protects state-created property rights is resolved by precedents in this circuit . . . ." *Walz v. Town of Smithtown*, 46 F.3d 162, 169 (2d Cir. 1995), *cert. denied*, 515 U.S. 1131 (1995); *see also Reserve, Ltd. v. Town of Longboat Key*, 17 F.3d 1374, 1379 (11th Cir. 1994) (substantive due process requires inquiry into whether there was a deprivation of a property interest " 'for an improper motive and by means that were pretextual, arbitrary and capricious . . . .' ", *quoting Hearn v. City of Gainesville*, 688 F.2d 1328, 1332 (11th Cir. 1982). In *Walz*, the court ruled that there is a "substantive due process right not to be subject to an arbitrary and capricious denial of an excavation permit". *Id.*[8] Where the permit involves not the commercial right of excavation, but the much more basic right to live in the home one owns, an arbitrary and capricious delay in its issuance should be subject to no less scrutiny.

II. THE ISSUE OF AN OWNER'S RIGHT TO PERSONALLY OCCUPY HIS HOUSE IS AN IMPORTANT FEDERAL QUESTION WHOSE DISPOSITION BELOW CONTRADICTS SUPREME COURT RULINGS

A. While The Courts Below Decided The Takings Issue On Both Federal And State Grounds, The Latter Rulings Are So Untenable That They Do Not Bar This Court's Consideration Of The Federal Takings Question

The courts below clearly ruled on the merits of both the Zimans' federal due process claim and takings claim.

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[8] In contrast, the Ninth Circuit has ruled that substantive due process protections do not extend to property rights. *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996) (en banc). The instant case presents an opportunity for this Court to reconcile these disparate approaches among the Circuits.

However, the courts also ruled that the later was time-barred under state procedural law. Normally, an independent state court ruling of this sort would prevent consideration by this Court of the underlying federal claim, because in such cases a ruling by this Court "could amount to no more than an advisory opinion". *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945).

Nonetheless, this Court has also recognized that, under certain circumstances, such a ruling may be so untenable that Supreme Court review of the federal claim is still warranted. As this Court noted in *NAACP v. Alabama*, 357 U.S. 449, 457-58 (1958):

> "Novelty in [state] procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights." *See also id.* at 377 U.S. 288, 301 (1964).

Among the factors involved in assessing the state rule is the extent to which it is "reasonable . . . and clearly announced". *Henry v. Mississippi*, 379 U.S. 443, 448 n.3 (1965).

For several very compelling reasons, the rulings on the timeliness of the Zimans' takings claim fails this standard. As is shown directly below, that ruling was an unexplained creation of new law which directly contradicted the precedent on which it purported to rely.

Under New York law, a claim for appropriation of property must be filed within three years of accrual. App. 9a, citing N.Y. Court of Claims Act § 10(1). The Zimans contended that their cause of action "accrued on January 2, 1992, the date on which the last tenant finally vacated. Claimants assert that this was the date on which their damages became ascertainable and that a claim accrues when damages accrue." App. 9a. Their N.Y. Supreme Court action was filed in May, 1993, one and one-half years after that date. *Id.* The ruling in that

case, which held that only the Court of Claims could review the takings claim, was issued in April, 1995. App. 13a. At that point, the Zimans took advantage of a state statute which permits timely actions filed in the wrong court to be re-filed, within six months of dismissal, in the proper forum. New York Civil Practice Law and Rules (CPLR) § 205(a) states:

> "If an action is timely commenced and is terminated in any other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff . . . may commence a new action upon the same transaction or occurrence . . . within six months after the termination provided that the new action would have been timely commenced at the time of commencement of the prior action and that service upon the defendant is effected within the six-month period."

The New York Court of Claims Act requires that claims court practice conform to supreme court practice "except as otherwise provided". N.Y. Court of Claims Act § 9.9 (29-A Part II McKinney's). The Court of Claims recognized the applicability of CPLR § 205(a) to cases before it. App. 10a. Nonetheless, it still held that the action was not timely commenced, because "no claim was filed with the Court of Claims within three years of the claim's accrual." App. 11a, *citing Charbonneau v. State of New York*, 148 Misc. 2d 891, *aff'd* 178 A.D.2d 815, *aff'd*, 81 N.Y.2d 721, 593 N.Y.S.2d 758 (1992) (under caption of companion case, *Dreger v. New York State Thruway Authority*).

On appeal to the Appellate Division, the Zimans made two essential points: 1) the case cited by the Court of Claims involved a failure to timely commence the originally-filed action rather than the subsequently-filed action; it thus was inapplicable to the Zimans, whose original action (that is, the one in state supreme court) was

clearly timely;[9] 2) the cited decision expressly stated that it applied only to pre-1992 actions. In 1992, the CPLR was amended with a new commencement-by-filing rule which made the applicability of CPLR § 205(a) to the Court of Claims even clearer.[10] Appellate Division, Plaintiffs Brief 9-14; Reply Brief 4-7. In the words of one noted commentary, this factor would "support a different result today on the *Dreger facts*." 7B McKinney's CPLR § 205, Supp. Practice Commentary C205:3, 1997-98 Supp. at 84.

Despite the extensive briefing on this issue, the Appellate Division devoted only one sentence to this issue, summarily reiterating the Court of Claims ruling with no

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[9] In both *Charbonneau* and *Dreger*, it was the *original* actions that were not timely commenced. These were first brought *in the Court of Claims*, where they were dismissed and became time-barred because of the claimants' failure to properly serve the Attorney-General. Unlike the Zimans case, these cases, in their original incarnations, were never "timely commenced" within the meaning of CPLR § 205(a).

This fact was explicitly noted in the lower court decisions in these cases. In *Dreger* the Appellate Division stated:

> "Since the first claim had never been properly commenced, CPLR 205(a) provided no relief to claimants and their second action was untimely." 177 A.D.2d 762, 575 N.Y.S.2d 743, 744 (3d Dept. 1991).

Similarly, in *Charbonneau* the Court of Claims stated:

> "In order for the Court to determine that CPLR 205(a) applies to the instant situation, we must determine if the original claims . . . were 'timely commenced', that is, whether the jurisdictional requirements of the Court of Claims Act were satisfied. . . . Because service was a nullity, no action had been actually commenced, and CPLR 205(a), therefore, does not apply . . . ." 561 N.Y.S.2d 876, 880 (Ct. Cl. 1990).

[10] The state Court of Appeals stated: "We have consistently held that, for purposes of CPLR 205(a) actions prior to the 1992 CPLR amendments . . . timely commencement requires literal compliance with the relevant statutes governing notice . . . ." 81 N.Y.2d at 723, 593 N.Y.S.2d at 759. Among those amendments was a change in CPLR § 304; its commencement-by-service rule was replaced by a new commencement-by-filing rule, a change which applies to Court of Claims actions.

mention of the Zimans' arguments on this point. App. 5a. This cursory ruling should not serve to preclude review by this Court of the merits of the federal taking claim.

Despite their holding that the takings claim was untimely, the state courts nonetheless did proceed to address its merits. As shown below, their treatment of the latter conflicts with decisions of this Court, of the high courts of two states, and of several federal circuit courts as well.

B. This Court's Decision In *Yee v. City of Escondido* Indicates That The Compelled Tenancies Imposed On The Zimans For Over Seven Years Constitute A Taking Of Their Property

The Appellate Division stated that the Zimans suffered no taking because the law at issue "advanced a legitimate State interest and appellants were not denied an economically viable use of the property." App. 5a, *citing Dawson*, 197 A.D.2d 127, 610 N.Y.S.2d 200. As discussed above, the court's holding on economically viable use is directly contrary to its finding of financial hardship in *Ziman I*. As shown below, the other factor cited by the Appellate Division, of legitimate state interest, cannot suffice to override this Court's rulings on the right of property owners to exclude third parties from their property.

This Court has repeatedly noted that the "right to exclude others is 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994), *quoting Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979). It has vigorously reaffirmed this right in contexts ranging from forced public access to private marinas (*Kaiser Aetna, supra*) to cable television boxes on apartment house roofs (*Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)) to easements imposed upon beachfront yards (*Nollan v. California Coastal Commission*, 483 U.S. 825 (1987)) to municipal floodplain exactions. *Dolan, supra.*

Most importantly, in *Yee* this Court considered the application of this right to compelled tenancies. This Court held that there was no physical taking in that case because there had been no compelled tenancy:

> "At least on the face of the regulatory scheme, neither the City nor the State compels petitioners, once they have rented their property to tenants, to continue doing so." 503 U.S. at 527-28.

But the Court did indicate that if the law *had* compelled the landowners to rent, then it would have been unconstitutional:

> "A different case would be presented were the statute, on its face or as applied, to compel a landowner over objection to rent or to refrain in perpetuity from terminating a tenancy." *Id.* at 528, *citing FCC v. Florida Power Corp.*, 480 U.S. 245, 251-52 n.6 (1987); *Nollan v. California Coastal Commission*, 483 U.S. 825, 831-32 (1987); *Fresh Pond*, 464 U.S. at 877 (Rehnquist, J., dissenting).

The Zimans' predicament involved precisely this sort of compulsion. As a result of the law and agency actions here at issue, the Zimans were denied the right to exclude outsiders from the most private and intimate form of property—their own house.[11]

C. This Court Has Recognized The Constitutional Right Of A Landlord To Cease Renting Even In The Context Of Rent Control

The Appellate Division's mention of "legitimate State interest" (App. 5a) apparently refers to the general validity of rent control; in the words of the *Dawson* case cited by that court, the state has "broad power to regulate housing conditions in general and the landlord-tenant

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[11] It is noteworthy that in both *Sobel* and *Dawson*, the New York Court of Appeals declined to even review the constitutional issues raised in these cases, despite their obvious tension with rulings by this Court. 82 N.Y.2d 655; 83 N.Y.2d 896.

relationship in particular without paying compensation for all economic injuries that such regulation entails." 610 N.Y.S.2d at 205, *quoting Pennell v. City of San Jose*, 485 U.S. 1, 12 n.6 (1988).

Rent control, however, does not enjoy some categorical exemption from takings law. An action which constitutes a taking in a *non*-rent control context is not magically absolved when it takes place under rent control. There is no basis for contending, for example, that a landlord's "traditional right to evict a tenant in order to occupy a rental unit personally" (*Fresh Pond*, 464 U.S. at 876) vanishes if the unit is rent-controlled.

To the contrary, this Court has made it clear that the right to exclude is as basic to rent controlled property as it is to any other. The federal Emergency Price Control Act of 1942, 56 Stat. 23, 50 U.S.C. App. § 901 et seq., on which New York's rent control statute is based, imposed rent control in federally-designated military defense areas. In rejecting a takings challenge to this act, the Supreme Court emphasized that the law did not restrict a landlord's ability to cease renting:

> "We are not dealing here with a situation which involves a 'taking' of property. *Wilson v. Brown* [137 F.2d 348 (Emer. Ct. App. 1943)]. By § 4(d) of the Act it is provided that 'nothing in this Act shall be construed to require any person to sell any commodity or to offer any accommodations for rent.' There is no requirement that the apartments in question be used for purposes which bring them under the Act." *Bowles v. Willingham*, 321 U.S. 503, 517 (1944).

The *Wilson* decision cited by the Court made this constitutional connection even clearer:

> "[T]he Act does not require the landlord to continue his property in the market for housing accommodations. . . . In accordance with this statutory provision . . . a landlord may evict a tenant whose lease

> has expired if he 'seeks in good faith not to offer the housing accommodations for rent.' *The landlord is thus free to occupy the property himself,* or devote it to some commercial enterprise, or utilize it in any other way. *This serves to emphasize that there has been no 'taking' of his property in the constitutional sense.*" *Wilson,* 137 F.2d at 352 (emphasis added).[12]

In fact, the New York Court of Appeals itself once reiterated this view, noting that

> "the Supreme Court had suggested [in *Bowles*] that there was an *absolute right* in an owner to evict tenants so as to use his property for uses not covered by the act." *New York University v. Temporary State Housing Rent Commission,* 304 N.Y. 124, 127, 106 N.E.2d 44, 46 (1952) (emphasis added).

In short, compelled tenancies of the sort suffered by the Zimans raise the most serious constitutional issues of property rights.

III. THE DECISION BELOW CREATES A SPLIT AMONG STATE HIGH COURTS ON THE ISSUE OF OWNER OCCUPANCY

The Appellate Division's cursory treatment of the takings issue stands in sharp contrast to the decisions of two other state high courts. In Massachusetts, the application of a similar retroactive owner-occupancy bar was held to be a taking:

> "Here . . . the owner purchased with the reasonable belief that Ordinance 926 conferred upon her the right to buy her unit and remain in it. If Ordinance 980 were to be applied retroactively, it would

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[12] This same absence of compulsion under the federal act was reemphasized by the Supreme Court in yet another case: "The present statute is not open to the objection that petitioners are *compelled* to serve the public . . . ." *Yakus v. United States,* 321 U.S. 414, 437 (1944) (concerning the application of the federal act to beef wholesalers) (emphasis added).

thereby interfere with the plaintiff's primary expectation concerning the use of the property. . . .

". . . The board would physically exclude her from living in her unit as owner, and would require that the unit be made available for physical occupation by a tenant. If the board were to exclude her from her property in this way, there would be a taking for which she would be entitled to just compensation." *Polednak v. Rent Control Board of Cambridge*, 397 Mass. 854, 861-62, 494 N.E.2d 1025, 1030 (1986) (footnote omitted).

The Washington Supreme Court dealt similarly with a local bar on houseboat evictions by moorage owners. The ordinance made it "impossible for the houseboat owner to be evicted and impossible for the owner of the moorage to use the moorage for the owner's residence." *Kennedy v. City of Seattle*, 94 Wash. 2d 376, 386, 617 P.2d 713, 719 (1980). *See also Granat v. Keasler*, 99 Wash. 2d 564, 663 P.2d 830 (1983).[18]

In short, the decision below conflicts not only with decisions of this Court, but also with those of other state courts of last resort. Supreme Court Rule 10(b).

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[18] Both the Massachusetts and the Washington decisions involved interpretations of the Fifth Amendment. In *Polednak*, the court rested its holding on *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), and on *Flynn v. City of Cambridge*, 383 Mass. 152, 418 N.E.2d 335 (1981). *See Polednak*, 395 Mass. at 861, 494 N.E.2d at 1030. *Flynn*, in turn, based its constitutional analysis solely on U.S. Supreme Court decisions. *See* 383 Mass. at 160-61, 418 N.E.2d at 339-40.

The *Kennedy* decision is based on both the Fifth Amendment and the state constitution. *See* 94 Wash. 2d at 384, 617 P.2d at 719.

IV. THE SEVEN YEAR DELAY IN THE ZIMANS' ABILITY TO REALIZE THEIR LEGITIMATE EXPECTATIONS OF OCCUPYING THEIR HOME CONSTITUTES A REGULATORY TAKING

A. The Zimans' Expectations Of Being Able To Evict Their Tenants Were Fully Legitimate

The physical intrusion suffered by the Zimans goes beyond what this Court has previously characterized as takings by physical occupation. But it is also clear that "interference with reasonable investment backed expectations" can constitute a taking of a different sort—a regulatory taking. *Kaiser Aetna,* 444 U.S. at 175.

As shown above, the right to occupy one's property is a fundamental constitutional element. Owner-occupancy eviction provisions are "founded on what is considered to be a basic right of ownership . . . ." Barr, *Guidelines For Drafting Rent Control Laws—Lessons of a Decade,* 35 Rutgers L. Rev. 723, 834 (1983).

Nonetheless, owner-occupancy rights have been steadily eroded by numerous rent control regimes. "The aggressive system of rent control makes taking units off the market illegal . . ., often bringing innocent landlords into the net woven by the law until it becomes a crime for a landlord to occupy his own apartment." R. Epstein, *The Moral and Practical Dilemmas of an Underground Economy,* 103 Yale L.J. 2157, 2172 (1994); *see also Note: Are Landlords Being Taken By the Good Cause Eviction Requirement?,* 62 S. Cal. L. Rev. 321, 347 (1988); K. Manheim, *Tenant Eviction Protection And The Takings Clause,* 1989 Wis. L. Rev. 925, 969-72.

In the case of the Zimans, their expectation was based on explicit New York law. It thus met the two key criteria of legitimacy set out in *Lucas v. South Carolina Coastal Council*: it was based on "a rich tradition of protection at common law" and it had "been shaped by the State's law of property". 505 U.S. 1003, 1016 n.7 (1992).

The Zimans' reliance on this was precisely what the Supreme Court had in mind when it noted "the importance of honoring reasonable expectations in property rights." *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 482 (1988). New York's "decision to arbitrarily switch back and forth" in its recognition of this right is exactly the sort of flip-flop that, in the field of takings jurisprudence, "raise[s] serious constitutional questions." *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 315 (1989).

More than seventy years ago, Justice Holmes pointed out that the Fifth Amendment's compensation requirement is intended to check "the natural tendency of human nature . . . to extend [regulation] more and more until at last private property disappears." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1992). It was precisely this regulatory tendency that ended up swallowing the Zimans' right of owner occupancy.

B. The State's Interest In Protecting Certain Classes Of Tenants Cannot Justify The Denial Of Compensation To The Zimans

The Twenty Year Law gives special treatment to three categories of tenants: the elderly, the disabled, and long-term tenants. It was on the third basis, that of long-term residency, that the Zimans' tenants were protected. App. 14a.

The law's three categories are not inextricably entwined; the elderly and the disabled could have been protected even if the law had not covered long-term tenants. Long-term tenants, on the other hand, receive special protection even if they are healthy and rich. In evaluating New York's interest in favoring long-term tenants, the considerations involved in state protection of elderly and disabled tenants can be put aside. Viewed in this light,

there is no substantial government interest in treating long-term tenants as a special class.[14]

The Twenty Year Law's legislative history noted the difficulty of eviction for the elderly and disabled, but it was silent on why long-term tenants who are *not* elderly or disabled would face some hardship greater than other evicted tenants. According to one report,

> "[e]viction is a serious hardship for senior citizens, long term tenants, and the disabled. Moving often means harmful amounts of physical effort for senior citizens and may be nearly impossible for the disabled. In the present housing market, renting a new apartment can be financially devastating to a person on a retirement or limited income." Memorandum of Assemblyman R.N. Gottfried, 1984 N.Y.S. Legislative Annual 109.

Another report was similarly vague on why long-term tenants needed such favored status:

> "[L]ong-term tenants of two decades are often elderly, although not 62 years of age, and have limited incomes. These tenants, by virtue of their longevity, have become an integral part of their community . . . . [F]orcing them out of their housing accommodations after 20 years could have a devastating effect on them and their community." Budget Division, Report on Bill No. 3586-B at 2 (1984).

But if New York had wished to protect elderly tenants who were "not 62 years of age", then it could have lowered the law's age threshold. If it wished to protect

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[14] The Twenty Year Law gave the Zimans' tenants a greater right to intrude on their property than that of soldiers serving their country. The Third Amendment to the U.S. Constitution states: "No soldier shall, in time of peace, be quartered in any house, without the consent of the owner . . . ." These "property-based privacy interests protected by the Third Amendment" are "recognized and permitted by society as founded on lawful . . . possession with a legal right to exclude others." *Engblom v. Carey*, 677 F.2d 957, 962 (2d Cir. 1982).

tenants with limited incomes, it could have adopted a financial means test. *See, e.g., Pennell,* 485 U.S. 1. Instead, New York decided to award this preferential status solely on the basis of community residence.

This Court, however, has repeatedly rejected durational residence as a basis for unequal state treatment. *See Vlandis v. Kline,* 412 U.S. 441 (1973) (rejecting higher state university tuition fees for new as opposed to established residents); *Shapiro v. Thompson,* 394 U.S. 618 (1969) (rejecting residency requirement for welfare assistance); *Zobel v. Williams,* 457 U.S. 55 (1982) (rejecting length of in-state residency as basis for distribution of state oil royalties).

The constitutional grounds for these decisions were equal protection and the right to travel. Takings jurisprudence requires a similar inquiry into the legitimacy of the asserted state interest and of the means chosen to advance it. As the Supreme Court stated in *Penn Central Transportation Co. v. New York City,* 438 U.S. 104, 127 (1978), "a use restriction on real property may constitute a taking if not reasonably necessary to the effectuation of a *substantial* public purpose." (Emphasis added.)

C. In Imposing The Burden Of Housing Selected Classes of Tenants On Individuals Such As The Zimans, Based Only On The Accident of Occupancy, New York Violated The Constitutional Requirement That Public Burdens Be Borne By The Public And Not By Haphazardly Selected Individuals

Even if one assumes that New York has a legitimate interest in favoring long-term tenants, its method for advancing that interest violates constitutional requirements of fairness. The guarantees of due process and just compensation are intended to prevent individuals from being forced to "surrender to the public something more and different from that which is exacted from other members of the public." *Monongahela Navigation Co. v. United*

States, 148 U.S. 312, 325 (1892). The ban on uncompensated takings "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

The New York Court of Appeals has itself recognized the fundamental unfairness of such government attempts:

> "The ultimate evil of a deprivation of property . . . under the guise of an exercise of the police power is that it forces the owner to assume the cost of providing a benefit to the public without recoupment. . . . [A]s further consequence, the ultimate economic cost of providing the benefit is hidden from those who in a democratic society are given the power of deciding. . . . When [the socal cost is] successfully concealed, the public is not likely to have any objection to the 'cost-free' benefit." *Fred F. French Investing Co. v. City of New York*, 39 N.Y.2d 587, 596-97, 385 N.Y.S.2d 5, 11 (1976).

The Twenty Year Law operates precisely through this "cost-free" guise. It arbitrarily imposes its cost on unlucky landlords such as the Zimans—an action which, "even if otherwise valid, might violate either the incorporated Takings Clause or the Equal Protection Clause." *Nollan*, 483 U.S. at 835 n.4.

Regardless of how politically expedient this form of legislative legerdemain may be, it is not constitutional.

CONCLUSION

When Jerrold and Ellen Ziman bought their house in 1984, they legitimately expected to be able to use the owner-occupancy eviction law so that their family could fully occupy it as their home. New York State destroyed that expectation, and then DHCR mishandled their eviction applications. As a result, they lost the ability to make their house their home for over seven years.

The decision below, denying them compensation for this delay, contradicts basic rulings of this Court on property rights. Furthermore, it conflicts with decisions by two other state high courts and by several federal circuit courts on major issues of property rights and due process.

For these reasons, and for the other reasons set forth above, a writ of certiorari should issue to review the order of the New York State Court of Appeals.

Respectfully submitted,

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December 17, 1997

APPENDICES

APPENDIX A

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the eighteenth day of September, 1997.

Present, HON. JUDITH S. KAYE, *Chief Judge, presiding.*

1-10 Mo. No. 918

JERROLD ZIMAN, *et al.*,
Appellants,
v.
NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL, *et al.*,
Respondents.

JERROLD ZIMAN, *et al.*,
Appellants,
v.
THE STATE OF NEW YORK,
Respondents.

A motion for leave to appeal to the Court of Appeals in the above causes having heretofore been made upon the part of the appellants herein and papers having been submitted there on and due deliberation having been thereupon had, it is

ORDERED ,that the said motion be and the same hereby is denied.

/s/ Stuart M. Cohen
STUART M. COHEN
Clerk of the Court

APPENDIX B

AT A TERM OF THE APPELLATE DIVISION OF THE SUPREME COURT HELD IN AND FOR THE FIRST JUDICIAL DEPARTMENT IN THE COUNTY OF NEW YORK, ON MAY 8, 1997

Present, HON. E. LEO MILONAS, Justice Presiding, BETTY WEINBERG ELLERIN, ISRAEL RUBIN, ANGELA M. MAZZARELLI, Justices

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M-1302

Index No. 113700/93

JERROLD ZIMAN, *et al.*,
Plaintiffs-Appellants,

-against-

NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL, *et al.*,
Defendants-Respondents.

JERROLD ZIMAN, *et al.*,
Claimants-Appellants,

-against-

THE STATE OF NEW YORK,
Defendants-Respondents.

Plaintiffs/claimants-appellants having moved for leave to appeal to the Court of Appeals from this Court's decision and order entered on January 30, 1997 (Appeal No. 59832-59833),

Now, upon reading and filing the papers with respect to the motion, and due deliberation having been had thereon,

It is ordered that said motion be and the same is denied.

ENTER:

/s/ Catherine O'Hapan Wolfe
Clerk

APPENDIX C

STATE OF NEW YORK
SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

59832-59833

JERROLD ZIMAN, *et al.*,
Plaintiffs-Appellants,

-against-

NEW YORK STATE DIVISION OF HOUSING
AND COMMUNITY RENEWAL, *et al.*,
Defendants-Respondents.

JERROLD ZIMAN, *et al.*,
Claimants-Appellants,

-against-

THE STATE OF NEW YORK,
Defendants-Respondents.

MILONAS, J.P., ELLERIN, RUBIN, MAZZARELLI, J.J.

Judgment, Supreme Court, New York County (Stephen Crane, J.), entered May 10, 1995, which, *inter alia*, declared that plaintiffs' due process rights were not violated, and order, Court of Claims (Louis Benza, J.), entered on or about May 17, 1996, which, *inter alia*, granted defendant State of New York's cross motion for summary judg-

ment dismissing appellants' claim, unanimously affirmed, without costs.

Since appellants did not meet the literal requirements of Court of Claims Act § 10(1), the Court of Claims properly found that their action was not timely commenced and that relief under CPLR 205(a) was not available to toll the statutory limitations period (*see, Dreger v New York State Thruway Auth.*, 81 NY2d 721).

The purported delay of respondent Department of Housing and Community Renewal in processing appellants' applications for hardship certificates of eviction necessitated by the passage of the Twenty Year Law did not effect an unconstitutional "taking" of property since the law advanced a legitimate State interest and appellants were not denied an economically viable use of the property (*see, Dawson v Higgins*, 197 AD2d 127, 137-138, *appeal dismissed* 83 NY2d 996, *cert denied sub nom. Dawson v Halperin*, 115 S Ct 724). Nor were appellants deprived of due process by respondents' actions, or the laws and regulations involved herein, as all bore a reasonable relationship to a valid public purpose.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

Entered: January 30, 1997

/s/ Catherine O'Hapan Wolfe
Clerk

APPENDIX D

[Filed May 17, 1996]

STATE OF NEW YORK
COURT OF CLAIMS

Claim No. 92736

JERROLD ZIMAN AND ELLEN ZIMAN,
Claimants,

-against-

THE STATE OF NEW YORK,
Defendant.

Motion No. M-53104
Cross Motion No. CM-53352

Before: HONORABLE LOUIS C. BENZA, Judge of the Court of Claims.

MEMORANDUM DECISION and ORDER

BENZA, J.

Claimants seek an order pursuant to CPLR 3212 granting them summary judgment on the issue of liability for the de facto appropriation of their property. The State cross-moves pursuant to CPLR 3211 and 3212 for an order dismissing the claim.

Claimants' claim arises from their efforts to evict three tenants [1] from a town house they bought on Minetta Lane in Manhattan and the number of years it ultimately took to accomplish this. They purchased the property in February 1984 and sought to obtain the units for their

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[1] One tenant died during the course of the proceedings. Eviction warrants were ultimately issued against the remaining two.

personal use and occupancy by applying to the Division of Housing and Community Renewal (DHCR) for certificates of eviction of the tenants. Claimants were prevented from obtaining the certificates of eviction due to the enactment of Chapter 234 of the Laws of 1984 (9 NYCRR 2204.5 [a]), which, among other things, protects from eviction tenants who have been residents in rent-controlled apartments for more than twenty years (the Twenty-Year Law).

In August 1984 claimants then moved for eviction based on a different ground, to wit, a "hardship" eviction pursuant to 9 NYCRR 2204.9 and 2204.4 (g) because they could not earn an 8½ percent return on the assessed value of the property. Two financial audits, completed in April and October 1985, respectively, and a fact-finding hearing established that claimants qualified for the hardship application.

In June 1986 a DHCR Administrative Law Judge ruled that despite claimants' showing of hardship, they were not permitted to evict their tenants because the hardship provisions of the rent control law could not circumvent the separate protection provided by the Twenty-Year Law. Claimants commenced an article 78 proceeding challenging DHCR's decision. In August 1988 the Supreme Court upheld the decision, holding that DHCR's order was not unconstitutional as applied.

In August 1989 the Appellate Division reversed the Supreme Court decision and ordered DHCR to issue certificates of eviction based on claimants' hardship application (*Matter of Ziman* v *New York State Div. of Hous. & Community Renewal*, 153 AD2d 489, *affd* 76 NY2d 727). The Appellant Division decided on statutory grounds and did not reach the constitutional issues. Following the Court of Appeals affirmance and subsequent denial of a motion to reargue by the tenants-intervenors, DHCR, on October 5, 1990, issued certificates of eviction.

Claimants were then subject to the three-month statutory waiting period between the date of issuance of the certificates of eviction and the commencement of proceedings against the tenants (9 NYCRR 2204.4 [b] [1] [i]). Claimants did not move to shorten this waiting period, as authorized by statute (9 NYCRR 2204.4 [3]). After commencing a summary holdover proceeding, claimants, on July 16, 1991, obtained judgments of possession and warrants of eviction. Housing Court then granted the tenants a discretionary stay of execution pursuant to Real Property Actions and Proceedings Law § 753. Claimants did not appeal this stay. The last tenant vacated the premises on January 2, 1992.

Claimants filed a notice of intention to file a claim with the Clerk of the Court on December 31, 1990, and served a copy upon the Attorney General, by certified mail, return receipt requested, on January 3, 1991 (*see*, Exh. A attached to State's cross-motion). The notice of intention alleges that the claim accrued on October 5, 1990. The claim was served upon the Attorney General on October 16, 1995 and filed with the Court on October 19, 1995 (*see*, Exh. B attached to State's cross-motion).

The claim asserts a cause of action against the State for temporary de facto appropriation of claimants' property as a result of the delay in evicting the tenants. The claim further asserts that it was timely filed under the three-year period set forth in Court of Claims Act § 10 (1) for appropriation claims. It also alleges that the time period was tolled during the pendency of a related Supreme Court action (*Ziman* v *New York State Div. of Hous. & Community Renewal and the State of New York* [Supreme Court New York County, Index No. 113700/93, judgment entered May 10, 1995 (*see*, Exh. I attached to claimants' motion)]). The Supreme Court dismissed claimants' appropriation cause of action on the basis of lack of subject matter jurisdiction. Claimants assert that

the action herein was timely commenced pursuant to CPLR § 205 (a) in that it was filed within six months of the dismissal of the Supreme Court action.

The Court must first determine whether this claim was timely and properly commenced. Court of Claims Act § 10 (1) provides that an appropriation claim be filed within three years of the accrual of the claim.

As claimants' counsel states in his memorandum of law in opposition to the State's cross-motion, Court of Claims Act § 10 (1) does not refer to the filing of notices of intention for appropriation claims, so the notice of intention served and filed in December 1990 did not extend claimants' time to file their claim. The question for the Court to determine is whether the claim served upon the Attorney General on October 16, 1995 and filed with the Court on October 19, 1995 was timely and properly commenced.

In his memorandum in opposition to the State's cross-motion, claimants' counsel asserts that claimants' cause of action accrued on January 2, 1992, the date on which the last tenant finally vacated. Claimants assert that this was the date on which their damages became ascertainable and that a claim accrues when damages accrue (*see, Boland* v *State of New York*, 30 NY2d 337; *Bronxville Palmer* v *State of New York*, 36 AD2d 647). Claimants assert that the actual eviction was a prerequisite to this claim; that until there was a successful eviction, a claim for delay in evicting the tenants would have been speculative (memorandum in opposition to cross-motion, p. 3).

For the purposes of this motion, the Court assumes, *arguendo*, that the claim accrued on January 2, 1992, the date urged by claimants. Claimants next argue that they filed a Supreme Court action (*Ziman* v *New York State Div. of Hous. & Community Renewal and the State of New York, supra*) in May 1993, one and one-half years after accrual; that the Statute of Limitations was tolled

during the pendency of that action and that, in any event, they (claimants) commenced the action herein within six months of the dismissal of the Supreme Court action and are entitled to the benefits of CPLR 205 (a).

The limitation period for bringing a claim in the Court of Claims is not automatically tolled as a result of improperly commencing a previous action (*see, ElSawah* v *State Ins. Fund*, 133 AD2d 540).

CPLR 205 (a) provides as follows:

> Termination of action
>
> (a) New action by plaintiff. If an action is timely commenced and is terminated in any other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff, or, if the plaintiff dies, and the cause of action survives, his or her executor or administrator, may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months after the termination provided that the new action would have been timely commenced at the time of commencement of the prior action * * *.

Court of Claims Act § 9 (9) provides that practice in the Court of Claims shall be the same as in Supreme Court except as otherwise provided in the Court of Claims Act, the Uniform Rules for the Court of Claims, and the Civil Practice Law and Rules. The Court of Claims Act does not specifically preclude the application of CPLR 205 (a), nor is there an implied preclusion (*Charbonneau* v *State of New York*, 148 Misc 2d 891, *affd* 178 AD2d 815, *affd* 81 NY2d 721; *see also, Tramantano* v *State of New York*, 131 Misc 2d 238).

In *Charbonneau* (*supra*), the Court of Appeals stated that CPLR 205 (a) allows recommencement only where the prior action was "timely commenced". Thus, the Court of Appeals stated, "we look not to the characterization of the grounds for dismissal, but to the narrow question of what constitutes timely commencement" (*id.*, at 723).

Thus, we must determine whether the original action was timely commenced. Court of Claims Act § 10 (1) provides that an appropriation claim be filed with the Clerk of the Court within three years of accrual. The claim must also be served upon the Attorney General within the same time period (Eminent Domain Procedure Law § 503). Here, claimants commenced an action in Supreme Court, but it is uncontroverted that no claim was filed with the Court of Claims within three years of the claim's accrual. Because suits against the State are allowed only by the State's waiver of sovereign immunity and in derogation of the common law, statutory requirements conditioning suit must be strictly construed (*id.*; *Lurie* v *State of New York*, 73 AD2d 1006, *affd* 52 NY2d 849). Accordingly, where, as here, claimants have not met the literal requirements of Court of Claims Act § 10 (1), their action was not timely commenced and relief under CPLR 205 (a) is not available (*see, Charbonneau* v *State of New York, supra*).

In any event, even if the claim were timely filed, we would still dismiss it. Therefore, this Court finds that the governmental activities complained of by claimants do not constitute any type of an appropriation of their property. The actions of DHCR officials and DHCR administrative law judges are sovereign in character and are quasi-judicial in nature, and require the exercise of judgment and discretion. This is an area of governmental activity for which the State has not waived its immunity (*Arteaga* v *State of New York*, 125 AD2d 916, *affd* 72 NY2d 212; *Bernkrant*

v *State of New York*, 26 AD2d 964; *Rottkamp* v *Young*, 21 AD2d 373, *affd* 15 NY2d 831).

Judges of courts of record are absolutely immune from civil liability for all acts done in the exercise of a judicial function (*Lombardoni* v *Boccaccio*, 121 AD2d 828). Supreme Court is a court of record (Judiciary Law § 2 [5]), and a determination of an article 78 petition is part of a judicial function. Accordingly, the State cannot be held liable for the actions of the judge in issuing a decision on the article 78 petition which was eventually reversed on appeal.

Claimants rely on *Keystone Assoc.* v *State of New York* (39 AD2d 176, *affd* 33 NY2d 848) for the proposition that sovereign immunity does not apply to appropriation claims. We agree with that proposition. However, we find claimants' reliance on *Keystone* (*id.*) to be misplaced as the statute in that case created a private corporation and vested it with the power to condemn the plaintiff's property and appropriate it. The statute at issue in the instant case is not of the same nature as it did not specifically authorize the taking of anyone's property, especially claimants'.

Based upon the foregoing, the State's cross-motion is granted and the claim is dismissed as untimely filed. Claimants' motion for summary judgment is denied as moot.

DATED: Albany, New York
May 3, 1996

/s/ Louis C. Benza
LOUIS C. BENZA
Judge of the Court of Claims

APPENDIX E

[Filed Apr. 21, 1995]

SUPREME COURT OF THE STATE OF
NEW YORK
COUNTY OF NEW YORK
IAS PART 53

Index No.: 113700/93
Mot. Seq. 001
#147 of 12/1/94

JERROLD ZIMAN AND ELLEN ZIMAN,
Plaintiffs,

-against-

NEW YORK STATE DIVISION OF HOUSING
AND COMMUNITY RENEWAL,
and THE STATE OF NEW YORK,
Defendants.

STEPHEN G. CRANE, J.:

Plaintiffs Jerrold and Ellen Ziman move for partial summary judgment declaring the defendants the State of New York and its agency, the Division of Housing and Community Renewal ("DHCR" or "Agency") liable on plaintiffs' four causes of action.[1] Plaintiffs seek to establish that three statutory rules governing evictions and the Agency's conduct in enforcing them constitute takings of property under the State and Federal constitutions for which the defendants owe just compensation. Plaintiffs also seek a judgment declaring that their right to due process of law was violated.

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[1] Plaintiffs have neglected to include a copy of the pleadings in their motion papers as required by CPLR 3212(b). The court, in this instance, will overlook this infirmity in view of the fact that the defendants have included the pleadings in support of their cross motion.

Defendants cross-move for summary judgment dismissing plaintiffs' complaint on the grounds that the court lacks subject matter jurisdiction, defendants are collaterally estopped from raising these issues, and, if the merits are reached, a declaration that the challenged statutes and their applications are constitutional.

Plaintiffs' claims arise from their efforts to evict three tenants [2] from a town house they bought on Minetta Street in Manhattan and the number of years it took ultimately to accomplish this. They purchased the property in February, 1984. Plaintiffs sought to obtain the units for their personal use and occupancy by applying to the DHCR for certificates of eviction of the tenants. Plaintiffs were prevented from obtaining the certificates of eviction by the enactment of Chapter 234, Laws of 1984, 9 NYCRR 2204.5(a), which, among other things, protects tenants from eviction who have been residents in rent-controlled apartments for more than twenty years (the "Twenty Year Law").

In August 1984, plaintiffs then moved for eviction based on a different ground, to wit, a "hardship" eviction pursuant to 9 NYCRR 2204.4(4) and (9) because they could not earn an 8½% return on the assessed value. Two financial audits, completed in April and October 1985, and a fact finding hearing established that plaintiffs qualified for the hardship application.

In June 1986, a DHCR Administrative Law Judge ruled that despite plaintiffs' showing of hardship, they were not permitted to evict their tenants because the hardship provisions of the rent control law could not circumvent the separate protections provided by the Twenty Year Law. Plaintiffs commenced an Article 78 proceeding challenging the Agency decision. One of the constitutional claims at issue on this motion was presented in the

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[2] One tenant died during the course of the proceedings; eviction warrants were ultimately issued againts the remaining two.

Article 78 proceeding. In August 1988, the Supreme Court upheld the Agency's decision, holding that the Agency order was not unconstitutional as applied.

In August 1989, the Appellate Division reversed the Supreme Court and ordered the DHCR to issue certificates of eviction based on plaintiffs' hardship application (*Ziman v. New York State Division of Housing and Comm. Renewal*, 153 AD2d 489, *aff'd* 76 NY2d 727). The Appellate Division decided on statutory grounds and did not reach the constitutional issues. Following the Court of Appeals affirmance and subsequent denial of a motion to reargue by the tenants-intervenors, the DHCR issued certificates of eviction on October 5, 1990.

Plaintiffs were then subject to the three month statutory waiting period between the date of issuance of the certificates of eviction and the commencement of the proceedings against the tenants. 9 NYCRR 2204.4(b)(1)(i). Plaintiffs did not move to shorten this waiting period as authorized by the statute. 9 NYCRR 2404.4(3). After commencing a summary holdover proceeding, plaintiffs obtained judgments of possession and warrants of eviction on July 16, 1991. Housing Court then granted the tenants a discretionary stay of execution pursuant to RPAPL 753. Plaintiffs did not appeal this stay. The last tenant vacated the premises on January 2, 1992.

On December 27, 1990, plaintiffs filed a Notice of Intention to File a Claim in the Court of Claims. This notice raised some of the constitutional issues now before this court. Plaintiffs, however, did not pursue the action in the Court of Claims, and defendants allege that the time to do so expired in December 1992.

Plaintiffs now argue that the delays in issuing the certificates of eviction by the DHCR, and the application of the Twenty Year Law, the three-month waiting period (9 NYCRR 2204.4(b)(1)(i)) and the six-month stay of eviction (RPAPL 753), each operated as an unconstitu-

tional taking of plaintiffs' property for which they are owed just compensation, and denied them due process of law

Subject Matter Jurisdiction

It is well settled that the proper forum for a claim seeking a declaration regarding the constitutionality of a statute is the Supreme Court (CPLR 3001; *Shields v. Katz*, 143 AD2d 743, 744 [2d Dept 1988]; *Wikarski v. State of New York*, 91 AD2d 1174 [4th Dept 1983]; *Fehlhaber Corp. v State of New York*, 69 AD2d 362, 374 [3d Dept 1979]). Although an action primarily seeking money damages against the State must be brought in the Court of Claims (*see*, NY Const, art VI, § 9; Court of Claims Act §§ 8, 9; *Schaffer v. Evans*, 57 NY2d 992, 994 [1982]), the Supreme Court may properly consider claims for monetary relief against the State which are dependent upon a threshold claim for declaratory relief (*see*, *Cass v. State of New York*, 58 NY2d 460, 463 [1983]; *Weissman v. Evans*, 56 NY2d 458 [1982]; *Kendall v. Evans*, 100 AD2d 508, 509 [2d Dept 1984]).

The general purpose of a declaratory judgment is to stabilize uncertain or disputed rights to present or prospective obligations (*James v. Alderton Dock Yards*, 256 NY 298, 305). Plaintiffs do not seek prospective relief; the tenants were evicted from plaintiffs' town house several years ago and the controversey concerning the tenants has come to an end. If the plaintiffs are entitled to any relief, it is retroactive only. Although this does not necessarily bar a suit against the State in the Supreme Court (*see*, *e.g.*, *Kendall v. Evans*, *supra*, 100 AD2d 508), it is fatal to plaintiffs' action. Plaintiffs' complaint and the arguments offered in support of their claims evidence that their "takings" claims are not dependent upon, nor do they require, a declaration of the unconstitutionality of the regulations at issue. Indeed, plaintiffs admit that they "are not challenging the rent control's validity." (Plain-

tiffs' Memorandum in Opposition to Defendants' Cross Motion, p. 15, dated Nov. 30, 1994). Rather, the primary focus of plaintiffs' claim is for money damages. To obtain this relief they need a determination of whether there was a taking of their property in violation of the State (NY Const, art I, § 7[a]) and Federal (US Const, 5th Amend) Constitutions,[3] a claim properly pursued under the Eminent Domain Procedure Law ("EDPL"). Indeed, plaintiffs cannot deny that the court could find a "taking" of their property without declaring any regulation unconstitutional.

Recognizing this, plaintiffs argue that judicial determinations of whether there has been a *de facto* taking are "not exclusively reserved for the Court of Claims." This blanket statement is wrong. EDPL 501(a) vests exclusive jurisdiction in the Court of Claims to hear and determine claims "against the state for the appropriation of any real or personal property," which extends to claims arising out of unconstitutional *de facto* appropriations of private property by the State (Court of Claims Act, § 9). Plaintiffs' reliance on the language in EDPL 702(c) is equally misplaced. Section 702(c) provides, in pertinent part, "[i]n the event that *a court of competent jurisdiction* determines that the condemnor did in fact take property. . . the condemnor shall be obligated to reimburse a condemnee . . . for actual and necessary costs . . . including reasonable attorney . . . fees. . . ." (emphasis supplied). Plaintiffs derive from this "court of competent jurisdiction" language that the "EDPL expressly envisions that the determination of whether there has been a taking can be made not only by the Court of Claims, but by any court of competent jurisdiction." Not exactly. EDPL 702 merely takes into consideration that claims of unconstitutional takings of

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[3] The taking without just compensation clause of the 5th Amendment is applicable to the States through the 14th Amendment (*see, Chicago, Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 236).

property are made not only against the State; municipal corporations and other public entities may also act as the "condemnor." And, pursuant to EDPL 501(b), the Supreme Court is vested with exclusive jurisdiction to adjudicate 5th Amendment claims against municipal corporations and other public entities (*see, Cox v. City of New York*, 265 NY 411, *cert. den.* 294 US 729). Accordingly, EDPL 702(c) merely gives authority to both the Court of Claims and the Supreme Court to grant attorneys fees in connection with the respective claims over which each court has jurisdiction, but it in no way diminishes the clear language of EDPL 501.

Plaintiffs' reliance on the pendency of two recent cases in the Supreme Court as support for their argument is equally misplaced. In the case of *Manocherian v. Lenox Hill Hosp. and the State of New York*, (154 Misc 2d 982), the plaintiffs sought to challenge the constitutionality of the Rent Stabilization Laws, and a declaration that they were not required to offer renewal leases to Lenox Hill Hospital. The State was a necessary party to the litigation because of its obvious interest in and right to be heard on matters concerning the constitutionality of statutes (*Cass v. State of New York*, 56 NY2d 460, 463; *Kendall v. Evans, supra*, 100 AD2d at 509). Significantly, *Manocherian* merely sought declaratory relief against the State; the monetary damages were sought only against Lenox Hill Hospital in connection with the renewal leases and were ancillary to the declaratory relief. Likewise, in *19th Street Assocs. v. State of New York*, (172 AD2d 380), no monetary damages were demanded; plaintiffs sought merely declaratory relief. In contrast with these cases are the claims by the Zimans, where the essence of the claims are for money damages. Plaintiffs' arguments in opposition completely ignore the provisions of the Court of Claims Act which preserve to the Court of Claims actions against the State in which the primary relief claimed is monetary (Court of Claims Act, §§ 8, 9). In sum, the

Court of Claims is the proper forum for resolution of the takings claims.

Due Process

Nevertheless, plaintiffs also seek a declaration that their rights to due process of law were violated by (1) the DHCR's delay in issuing the certificates of eviction, (2) the Twenty Year Law, (3) 9 NYCRR § 2204.4(b)(1)(i), and (4) RPAPL § 753. These claims are properly addressed by this court, given the limitation on the authority of the Court of Claims to entertain such questions (*see*, CPLR 3001).

Under the New York State Constitution (art I, § 6), no person may be deprived of his or her property without due process of law. Despite this constitutional protection, however, property rights are not absolute (*Dawson v. Higgins*, 197 AD2d 127, 132 [1st Dept 1994], *appeal dismissed* 83 NY2d 996, *cert. denied* 115 SCt 724 [1995]).

Although the First Department in *Dawson v. Higgins*, *supra*, has already rejected the argument that the Twenty Year Law deprives a landlord of due process of law, describing such a claim as "frivolous" (197 AD2d at 138), the gist of plaintiffs' due process claim is that the Twenty Year Law was passed *after* they purchased the property. However, plaintiffs were not barred from seeking to evict the tenants on a number of other grounds, one of which they successfully pursued, that is, the hardship application. The enactment of the Twenty Year Law did not create perpetual tenancies nor deprive the plaintiffs of the opportunity to litigate their right to the property. Moreover, "[r]ent control provisions . . . are well within the government's police powers. They bear 'a reasonable relationship to the valid public purpose of preserving affordable housing and preventing the dislocation of lower income and moderate income tenants." (*Id.* at 138-139; *Sobel v. Higgins*, 188 AD2d 286, 288). This is equally true of the

regulation providing for a three month automatic waiting period (9 NYCRR 2204.4(b)(1)(i)) and the six month stay of eviction (RPAPL 753). Finally, plaintiffs were afforded all of the process they were due in this litigation [4]; their claims were litigated in the Supreme Court, Appellate Division, and the Court of Appeals. Any "delay" in issuing the certificates of eviction not only served the purpose of protecting the tenants from being forced into the streets without their day in court, but also was the result of the parties' exercise of their rights to litigate fully their claims in the courts of this state. Therefore, the court determines that the plaintiffs were not deprived of due process of law.

In view of the foregoing conclusion, the court does not reach the collateral estoppel defense raised on the cross motion.

Accordingly, it is

ORDERED that the motion for summary judgment is denied; and it is further

ORDERED that the cross motion for summary judgment dismissing plaintiffs' complaint is granted in part so as to dismiss the claims for money damages for lack of subject matter jurisdiction and to declare the constitutionality of the challenged statutes and regulations and otherwise denied as academic; and it is further

ORDERED that plaintiffs' complaint is dismissed as to the claims seeking redress for monetary damages resulting from the taking of its property; and it is further

ORDERED, ADJUDGED AND DECLARED that DHCR's delay in issuing the eviction certificates did not violate plaintiffs' due process rights; and it is further

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[4] Although 9 NLCRR 2204.4(3) gives the Agency the authority to shorten the waiting period, plaintiffs never applied for this relief. Nor did plaintiffs appeal the discretionary stay granted the tenants under RPAPL 753.

ORDERED, ADJUDGED AND DECLARED that the enforcement of Chapter 234, Laws of 1984 did not unconstitutionally violate plaintiffs' due process rights; and it is further

ORDERED, ADJUDGED AND DECLARED that the enforcement of 9 NYCRR 2204.4(b)(1)(i) did not violate plaintiffs' due process rights; and it is further

ORDERED, ADJUDGED AND DECLARED that the enforcement of RPAPL § 753 did not violate plaintiffs' due process rights.

This is the decision and judgment of the court.

DATED: Apr. 13, 1995

ENTER:

Stephen G. Crane
J.S.C.

Norman Goodman
Clerk

APPENDIX F

STATUTORY PROVISIONS

McKINNEY'S 1984 SESSION LAWS OF NEW YORK

EVICTION OF SENIOR CITIZENS, LONG TERM OR DISABLED TENANTS ON GROUNDS OF LANDLORD'S PERSONAL USE

CHAPTER 234

Approved June 19, 1984, effective as provided in section 4

AN ACT to amend the administrative code of the city of New York, the emergency housing rent control law and the emergency tenant protection act of nineteen seventy-four, in relation to the eviction of senior citizens, long term or disabled tenants on grounds of landlord's personal use

The People of the State of New York, represented in Senate and Assembly, do enact as follows:[*]

Section 1. Paragraph one of subdivision b of section Y51-6.0 of the administrative code of the city of New York, as added by local law number twenty of the city of New York for the year nineteen hundred sixty-two and such section as renumbered by chapter one hundred of the laws of nineteen hundred sixty-three, is amended to read as follows:

(1) The landlord seeks in good faith to recover possession of a housing accommodation because of immediate and compelling necessity for his own personal use and occupancy or for the use and occupance of his immediate family[:] provided, however, that [where the housing accommodation is located in a building containing twelve or less housing accommodations and the landlord does not reside in the building and the landlord seeks in good

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[*] Additions in text indicated by italics; deletions indicated by brackets.

faith to recover possession for his own personal use and occupancy, an immediate and compelling necessity need not be established] *this subdivision shall not apply where a member of the household lawfully occupying the housing accommodation is sixty-two years of age or older, has been a tenant in a housing accommodation in that building for twenty years or more, or has an impairment which results from anatomical, physiological or psychological conditions, other than addiction to alcohol, gambling, or any controlled substance, which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques, and which are expected to be permanent and which prevent the tenant from engaging in any substantial gainful employment*; or

* * * *

§ 4. This act shall take effect immediately and shall apply to any tenant in possession at or after the time it takes effect, regardless of whether the landlord's application for an order, refusal to renew a lease or refusal to extend or renew a tenancy took place before this act shall have taken effect. The amendment to section Y51-6.0 of the city rent and rehabilitation law [1] made by section one of this act shall remain in full force and effect only so long as the public emergency requiring the regulation and control of residential rents and evictions continues, as provided in subdivision three of section one of the local emergency housing rent control act.[2] The amendment to section five of the emergency housing rent control law [3] made by section two of this act shall expire on the same date as such law expires and shall not affect the expiration of such law as provided under section one of such law. The amendment to section ten of the emergency tenant protection act of nineteen seventy-four [4] made

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[1] McK.Unconsol.Laws § Y51-6.0.

[2] McK.Unconsol.Laws § 8601.

[3] McK.Unconsol.Laws § 8585.

[4] McK.Unconsol.Laws § 8630.

by section three of this act shall expire on the same date as such act expires and shall not affect the expiration of such act as enacted by chapter five hundred twenty-six of the laws of nineteen hundred seventy-four, as last extended by chapter four hundred three of the laws of nineten hundred eighty-three.

APPENDIX G

STATUTORY PROVISIONS

RENT AND EVICTION REGULATIONS OF THE NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL

SUBCHAPTER D—NEW YORK CITY RENT AND EVICTION REGULATIONS

[65 McKinney Unconsolidated Laws 1987
set forth following § 8597]

§ 2204.5 Occupancy by landlord or immediate family

(a) A certificate shall be issued where the landlord seeks in good faith to recover possession of a housing accommodation because of immediate and compelling necessity for his own personal use and occupancy, or for the use and occupancy of his immediate family; provided, however, that this section shall not apply where a member of the household lawfully occupying the housing accommodation is 62 years of age or older, has been a tenant in a housing accommodation in that building for 20 years or more, or has an impairment which results from anatomical, physiological or psychological conditions, other than addiction to alcohol, gambling or any controlled substance, which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques, and which are expected to be permanent and which prevent the tenant from engaging in any substantial gainful employment. As used in this subdivision, the term "immediate family" includes only a son, daughter, grandson, granddaughter, stepson, stepdaughter, father, mother, father-in-law, mother-in-law, grandfather, grandmother, stepfather or stepmother.

No. 97-1011

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1997

JERROLD ZIMAN and ELLEN ZIMAN,

Petitioners,

- v -

THE STATE OF NEW YORK and the NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL,

Respondents.

and

JERROLD ZIMAN and ELLEN ZIMAN,

Petitioners,

- v -

THE STATE OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

BRIEF IN OPPOSITION FOR RESPONDENTS

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Dated: January 16, 1998

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QUESTION PRESENTED

Whether this case, in which petitioners succeeded over a seven year period in evicting tenants from their rent-controlled property, then had their subsequent takings claim dismissed, *inter alia*, for failure to file in a timely fashion under state law, presents a satisfactory context in which to determine whether a use limitation upon landlords property may constitute a compensable taking under the Fifth and Fourteenth Amendments or a denial of due process.

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THE STATE OF NEW YORK,

Respondent.

On Petition for a Writ of Certiorari to the
New York State Court of Appeals

Brief in Opposition for Respondents State of New York and the New York State Division of Housing and Community Renewal

Opinions Below

The decisions of the New York State Supreme Court in *Ziman v. New York State Division of Housing and Community Renewal* (Pet. App. 13a),[1] and the New York State Court of Claims in *Ziman v. The State of New York* (Pet. App. 6a) are unreported. The New York State Appellate Division, First Department consolidated the appeals of the two lower court decisions and affirmed them in an opinion (Pet. App. 4a) reported at 235 A.D.2d 369, 653 N.Y.S.2d 17 (1st Dept. 1997). Petitioners' motions for leave to appeal to the New York State Court of Appeals were denied (Pet. App. 1a, 2a) at 90 N.Y.2d 808 (1997).

Jurisdiction

The orders of the New York State Court of Appeals denying petitioners' motions for leave were entered on September 18, 1997. The petition for a writ of certiorari was filed on December 17, 1997, and docketed on December 18, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

Statement of the Case

Petitioners Jerrold and Ellen Ziman purchased a New York City townhouse in February 1984. At the time of purchase, the structure was divided into seven apartments, only several of which were occupied. In March 1984, desiring to obtain sole possession of the building for their personal use and occupancy, petitioners applied to respondent New York State Division of Housing and Community Renewal (DHCR) for certificates to evict three rent-controlled tenants pursuant to state law.

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[1] "Pet. App." refers to the appendix to the petition in No. 97-1011.

9 NYCRR 2204.5; *see generally* L. 1983, ch. 403 (R 63).[2] In July 1984, the New York State Legislature enacted a statute which, *inter alia*, constrained DHCR from issuing eviction certificates for tenants who had resided in rent-controlled apartments for more than twenty years. L. 1984, ch. 234 ("the Twenty Year Law") (Pet. App. 22a). Two of petitioners' tenants came within the reach of the Twenty Year Law (R 55).

In August 1984, petitioners filed hardship applications with DHCR, pursuant to state regulatory provisions which authorized the agency to issue eviction certificates in cases where a landlord cannot earn an annual 8-1/2% return on the assessed value of her property. 9 NYCRR 2204.4(g), 2204.9 (R 90). In the course of a lengthy evaluation of these applications, closely contested by petitioners' tenants, DHCR conducted financial audits of petitioners in April 1985 (R 101) and October 1985 (R 104), and held two adversarial fact finding sessions in June 1986. In June 1986, concluding that the hardship provisions of the NYCRR were superseded by the Twenty Year Law, a DHCR administrative law judge issued a determination denying the applications (R159); that determination was upheld on administrative appeal (R 8).

In April 1987, asserting that DHCR's determination denied them due process of law and constituted a taking of their property without just compensation, petitioners commenced a proceeding challenging the denial of their hardship applications. Supreme Court, New York County, dismissed the proceeding in August 1988, finding that the DHCR determination was constitutional. On appeal, the Appellate Division, First Department reversed. *Ziman v. New York State Division of Housing*

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[2]Numbers in parentheses preceded by the prefix "R" refer to page numbers in the Record On Appeal before the Appellate Division, First Department.

and Community Renewal, 153 A.D.2d 489, 544 N.Y.S.2d 147 (1st Dept. 1989), *affirmed* 76 N.Y.2d 721, 557 N.Y.S.2d 876 (1990) (*Ziman I*). Noting that petitioners had established undue hardship under 9 NYCRR 2204.9 and 2204.4, the Appellate Division deemed DHCR's denial of eviction certificates arbitrary and capricious (153 A.D.2d at 491, 544 N.Y.S.2d at 149). Consequently, the Appellate Division remitted the proceeding to DHCR with the directive that it issue certificates of eviction based on hardship. The Court of Appeals affirmed the First Department's decision in May 1990 and, complying with judicial order, DHCR issued eviction certificates in October 1990.[3]

On December 31, 1990, petitioners filed a notice of intention to file a claim before the New York Court of Claims, alleging that DHCR violated their constitutional and civil rights by preventing them from evicting their tenants from 1984 to October 5, 1990, and delaying the issuance of eviction certificates from May 31, 1990 to October 5, 1990 (R 146). Petitioners failed to file their claim within three years of the date of its accrual, as required by Court of Claims Act § 10(1).

Following the expiration of a three-month statutory waiting period (9 NYCRR 2204.4[b][1][i]), petitioners commenced summary holdover proceedings in January 1991 and obtained judgments of possession and warrants of eviction in July 1991. Following the expiration of a six-month judicial stay of execution (Real Property Actions and Proceedings Law [RPAPL] § 753), the last tenant was evicted from the premises on January 2, 1992 (R 57).

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[3]These decisions are not before the Court for review.

On May 27, 1993, petitioners commenced an action against DHCR and New York State in Supreme Court, New York County, alleging that they had suffered a taking of property without just compensation or due process under the State and Federal Constitutions by virtue of the Twenty Year Law, DHCR's purported "illegal delay" in issuing the certificates of eviction while the matter was in litigation, the three-month waiting period under 9 NYCRR 2204.4(b)(1)(i), and the six-month judicial stay of eviction granted pursuant to RPAPL § 753 (R 40-41). Petitioners sought $2,000,000 for the alleged due process violations and $250,000 for the alleged takings (R 42-43).

In *Ziman v. Division of Housing and Community Renewal*, Supreme Court denied petitioners' motion for partial summary judgment, granted in part defendants' cross-motion for summary judgment by dismissing the takings claim, and declared that the challenged statutes did not violate petitioners' due process rights (Pet. App. 13a). In dismissing the takings claim for lack of subject matter jurisdiction, the court noted that retroactive monetary damages sought under that claim could be awarded only by the New York Court of Claims (Pet. App. 19a). In dismissing petitioners' due process claim, the court held that the Twenty Year Law neither deprived petitioners of the power to evict tenants on various grounds, nor created perpetual tenancies, nor deprived the plaintiffs of the opportunity to litigate their right to the property. Since the regulatory framework was rationally related to a valid public purpose -- preserving affordable housing and preventing the dislocation of lower income and moderate income tenants -- and the delays in eviction were occasioned by the rights of various parties to pursue their legal remedies, the court held that petitioners had not been denied due process (Pet. App. 19a-20a).

On October 19, 1995, petitioners filed a claim for $250,000 with the Court of Claims, alleging that, by virtue of New York's statutes and regulations and DHCR's actions, they had suffered a temporary regulatory taking of property without just compensation. In *Ziman v. The State of New York*, petitioners moved for partial summary judgment and the State cross-moved for an order dismissing the claim on grounds that, having not initially been filed within three years of the claim's accrual (Court of Claims Act § 10[1]), it was untimely (Pet. App. 6a). Opposing this cross-motion, petitioners contended that the claim had been filed within six months of the dismissal of the Supreme Court action, and was consequently timely pursuant to the tolling provisions of § 205(a) of New York Civil Practice Law and Rules (CPLR).[4]

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[4] CPLR § 205(a) provides in part:

> New action by plaintiff. If an action is timely commenced and is terminated in any other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff * * * may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months after the termination provided that the new action would have been timely commenced at the time of commencement of the prior action.

On May 3, 1996, the Court of Claims issued an order granting the State's cross-motion and dismissing the claim (Pet. App. 12a). Accepting *arguendo* petitioners' contention that the claim accrued on January 2, 1992, the date the last tenant vacated the premises, the court concluded that CPLR § 205(a) did not preserve claims before the Court of Claims which had not been timely commenced before it (Pet. App. 11a). In addition, the Court of Claims noted that the claim, largely directed against the State for actions of officers adjudging legal remedies, should be dismissed on grounds of judicial immunity (Pet. App. 11a-12a).

On a consolidated appeal, the Appellate Division, First Department affirmed the orders of both the Supreme Court and Court of Claims dismissing the petition and claim (Pet. App. 2a-3a). It found both that CPLR § 205(a) was not available to toll the statute of limitations in an action not timely commenced in the Court of Claims, and that, because DHCR's actions and the State's statutes advanced a legitimate state interest and did not deny petitioners economic use of their property, the takings and due process claims lacked merit (Pet. App. 2a-3a).

Petitioners' motions for leave to appeal to the Court of Appeals were denied by both the Appellate Division (Pet. App. 2a-3a) and the Court of Appeals (Pet. App. 1a).

ARGUMENT

Because petitioners' regulatory takings claim was dismissed in state court for failure to comply with the state statute of limitations, this Court should decline to grant certiorari to review that claim. *Herb v. Pitcairn*, 324 U.S. 117 (1945). In any event, the regulatory takings claim is meritless: petitioners have failed to make a colorable argument that they were denied all economically beneficial use of their property under the state regulatory requirement. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992). Likewise, petitioners' claims that they were compelled to act as landlords for the lengthy period of litigation over their effort to evict their tenants, in violation of due process rights of liberty and occupational freedom (Pet. pp. 11-14) are meritless. Having purchased their property in a jurisdiction with many long-recognized state law remedies for the protection of tenants, petitioners can claim neither surprise nor unfairness in their tenants' tenacious efforts to avoid eviction or at the success that those efforts initially enjoyed. Moreover, inasmuch as that legal process yielded them the relief which they sought, this case poses no proper basis for petitioners' apparent challenge to the Twenty Year Law.

POINT I

INASMUCH AS THE DISMISSAL OF PETITIONERS' TAKINGS CLAIM WAS BASED UPON AN INTERPRETATION OF A STATE STATUTE OF LIMITATIONS AND DOES NOT RAISE A FEDERAL CONSTITUTIONAL ISSUE, THIS COURT SHOULD DENY CERTIORARI

For reasons of judicial economy and comity, this Court has long viewed cases in which a state court has ruled against a petitioner on an independent issue of state law as inferior vehicles for consideration of constitutional claims arising from the same proceeding. *Herb v. Pitcairn*, 324 U.S. at 125. In the instant matter, the Appellate Division confirmed the holding of the Court of Claims dismissing petitioners' regulatory takings claim as barred by the statute of limitations for failure to file properly in the Court of Claims (Pet. App. 5a). As that ruling was based on an independent state law ground, this Court should decline to grant certiorari to review the federal constitutional issues asserted by petitioners.

Petitioners' claim that this case established a novel rule of state law and presents an exception to the considerations set forth in *Herb v. Pitcairn* (Pet. p. 15) is meritless. As both the Court of Claims and the Appellate Division noted in the instant matter, the New York State Court of Appeals, in *Charbonneau v. State of New York*, 81 N.Y.2d 721, 593 N.Y.S.2d 758 (1992), set forth its intention to apply a strict and literal reading of the Court of Claims Act to bar untimely actions, thus allowing recommencement under CPLR § 205(a) only in actions that were timely commenced. While the precise issue addressed in the matter at bar had not been previously decided, it is hardly a novel application of that earlier principle. Simply stated,

petitioners have not supported and cannot support their claim that this ruling thwarted "justified reliance upon prior decisions" in the manner set forth by this Court in *NAACP v. Alabama*, 357 U.S. 449, 457 (1958) (Pet. p. 15). Consequently, the petition for certiorari should be denied.

POINT II

AS PETITIONERS HAVE SET FORTH NEITHER A VIABLE CLAIM OF A REGULATORY TAKING OF THEIR PROPERTY, NOR A PLAUSIBLE CLAIM THAT THEY WERE "COMPELLED" TO SERVE AS LANDLORDS, THIS COURT SHOULD DENY CERTIORARI

To the extent that the Appellate Division's ruling on alternative state law grounds does not preclude review of the issues raised in the petition for certiorari, this Court should nonetheless deny certiorari because petitioners have set forth no viable claim of a regulatory taking of their property, or denial of due process, or impressment into an occupation against their will.

It is well settled that a regulation which deprives an owner of the preferred or most beneficial use of her property does not render it unconstitutional. *See, e.g., Goldblatt v. Hempstead*, 369 U.S. 590, 592 (1962). As a general matter, land use regulation does not effect a taking when it "substantially advance[s] legitimate state interests [and does not] den[y] an owner economically viable use of his land." *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). Determination of whether a taking has occurred requires a more complex analysis, including examination of the economic impact of the regulation, the extent of its interference in reasonable investment-backed expectations, and the character of the government's action. *Penn Central Transportation Co. v New York City*, 438 U.S. 104, 124 (1978). A regulatory taking will be found where petitioners can demonstrate that they "ha[ve] been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave [their]...property economically idle." *Lucas v. South Carolina Coastal Council*, 505 U.S. at 1019.

As we have noted above, petitioners in the instant matter purchased a seven-unit property, occupied by several tenants, in New York City, a closely regulated housing market. They commenced, and ultimately prevailed in, a legal proceeding to evict those tenants. During the course of that legal proceeding, they were able to occupy the property -- although not to the full extent that they wished -- and to collect rents from units occupied by tenants. Under these circumstances, petitioners can make no showing that they were called upon to sacrifice all economically beneficial use of their property for the common good. *Lucas v. South Carolina Coastal Council*, 505 U.S. at 1019.

Likewise, petitioners have raised no viable claim to lack of due process or compelled landlordship (Pet. pp. 11-14). Petitioners willingly entered the real estate marketplace, knowingly purchased occupied property, and voluntarily became New York City landlords. Though they undertook that role with an intent that it be short-lived, petitioners upon purchase of occupied property willingly assumed responsibility for the rights of their tenants, including the right to resist eviction pursuant to state and local law. Ironically, the due process claim against the respondents in this matter arises solely from their role as jural agents in the eviction litigation process -- that is, providers of due process to all parties. Petitioners have cited no authority for the novel proposition that such judicial or quasi-judicial acts of resolving landlord-tenant disputes may result in a due process claim against the arbiter.

Nor is there merit in petitioners' claim that the decision at issue is in conflict with constitutional authority of other states. Simply stated, neither *Polednak v. Rent Control Board of Cambridge,* 397 Mass. 854, 494 N.E.2d 1025 (1986) (retroactive application of statute requiring permit for removal of unit

from rental housing market would constitute a taking) nor *Kennedy v. City of Seattle*, 94 Wash. 2d 376, 617 P.2d 713 (1980) (ordinance imposing restrictions on houseboat evictions deemed confiscatory) addresses the salient issue of this matter: whether a temporary taking occurs during the litigation of a landlord-tenant dispute which ultimately results in the full relief sought by the landlord.

Finally, petitioners' challenge to the substantive elements of the Twenty Year Law (Pet. pp. 24-25) is simply beside the point. As the statute and ancillary regulations have been interpreted in a manner which permits petitioners the full eviction relief which they initially sought, this case poses no basis for review of the statute's provisions.

In sum, petitioner has provided no support for the proposition that provision of a legal mechanism by which a tenant may challenge an eviction denies landlords due process or constitutes improper impressment of a property owner into the occupation of landlord. The instant action, we submit, is an inappropriate vehicle for consideration of this proposition. Consequently, this Court should deny the petition for a writ of certiorari.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Dated: New York, New York
January 16, 1998

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On Petition for a Writ of Certiorari to the New York State Court of Appeals

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PETITIONERS' REPLY BRIEF

ARGUMENT

I. NEW YORK STATE'S CLAIM THAT THE STATE LAW RULING BELOW BARS SUPREME COURT REVIEW IS AS UNPERSUASIVE AS IT IS CURSORY

This case raises constitutional issues of due process and property rights. The presence of an independent state law ruling below affects only the second of these issues, namely, whether the Zimans suffered a taking of their property. In its opposition, New York State attacks as "meritless" the Zimans' claim that this state law ruling "established a novel rule of state law". Opp 9. Nonetheless, even the State admits that "the precise issue addressed in the matter at bar had not been previously decided . . . ." *Id.*

That "precise issue" was whether, under New York law, a case timely filed in the wrong court may subsequently be refiled in the Court of Claims within six months of the first court's dismissal. This is a procedure which state law on its face clearly allows, but which the Court of Claims disallowed. Pet. 16, 9a-11a. The inapplicability of the cases relied upon by that court was extensively briefed by the Zimans on appeal, but their arguments received no mention whatsoever in the Appellate Division's cursory affirmance. Pet. 16-18, 5a.

Now, in its opposition, the State takes the same approach; it makes absolutely no attempt to show that the Zimans' reliance on statutory law was somehow invalid and that they therefore failed to meet the "unjustified reliance" criterion of *NAACP v. Alabama*, 357 U.S. 449, 457-58 (1958). Instead, the State simply declares that nothing novel occurred in the way of judicial rulings.

Admittedly, the numbing details of state procedural law rarely merit attention by this Court. Nonetheless, in this case the relevant state law, CPLR § 205(a), makes it perfectly clear that the route followed by the Zimans was proper. Pet. 16. The State's attempt to defend a

perfunctory ruling to the contrary with an equally perfunctory brief should be rejected.

II. GIVEN THE CONSTITUTIONAL RULINGS ISSUED BY THE COURTS BELOW, THE STATE'S ATTEMPT TO CHARACTERIZE THIS CASE AS AN INSIGNIFICANT LANDLORD-TENANT DISPUTE IS A GROUNDLESS EFFORT TO EVADE THE IMPORTANT ISSUES OF OWNER OCCUPANCY AND COMPELLED TENANCIES RAISED IN THIS ACTION

The State characterizes the issues raised in this action as stemming solely from "the litigation of a landlord-tenant dispute which ultimately results in the full relief sought by the landlord." Opp. 13. It attempts to minimize its own role by calling itself a mere "jural agent", involved in nothing more than refereeing a rental dispute between the Zimans and their tenants. Opp. 12.

These cavalier characterizations are groundless. The delay at issue in this case is not the time that Zimans spent litigating against their tenants, but the time they spent fighting the State and its housing agency.[1] As the

[1] Six and one-half years elapsed from the time the Zimans first filed their first eviction applications in early 1984, to the time that DHCR finally complied with the New York Court of Appeals ruling in *Ziman I* and granted those applications in October, 1990. Pet. 6, 15a. At least four months of that delay were arguably due to administrative malice. Pet. 13. The Zimans also sought compensation for two statutory waiting periods totaling nine months. Pet. 15a. Contrary to the State's suggestion, however, they did *not* seek compensation for the time spent litigating against their tenants in Housing Court over the exercise of their eviction certificates. *See* Pet. 6-7.

In holding that the Fifth Amendment's requirement of just compensation applies to temporary takings, this Court excepted the "normal delays" involved "in obtaining building permits . . . and the like". *First English Evangelical Lutheran Church v. Los Angeles*, 482 U.S. 304, 321 (1987). By no stretch of the imagination, however, can the time period at issue here be excused as a "normal delay".

record makes clear, the State was directly responsible for the two major elements of the Zimans' predicament: 1) the enactment of the Twenty Year Law, which retroactively destroyed the Zimans' legitimate expectations of being able to readily occupy their home on the basis of owner occupancy; and 2) DHCR's subsequent misreading of the eviction law and mishandling of the Zimans' eviction applications, which forced the Zimans into a lengthy and ultimately successful court battle over their right to evict on other grounds. The fact that this was a legal battle against the State is clear from the very caption of *Ziman I: Ziman v. Division of Housing and Community Renewal,* 153 A.D.2d 489, 544 N.Y.S.2d 147 (1st Dept. 1989), *aff'd,* 76 N.Y.2d 721, 557 N.Y.S.2d 876 (1990).

Had these State actions *not* occurred, and had the Zimans' dispute been purely with their tenants (as the State pretends it was), then this would be an entirely different case. It is precisely because the Zimans' dilemma was created by retroactive legislation and improper agency action that it presents these constitutional issues.

The State also suggests that since the Zimans were eventually able to evict their tenants, they received the "full relief" they sought, and that therefore their challenge to the Twenty Year Law is "simply beside the point". Opp. 13. This, however, was not how the lower courts in this case viewed the matter. The Zimans raised due process challenges to the Twenty Year Law in two courts below, and neither of these courts had any difficulty reaching the merits of those challenges. App. 5a, 19a-20a. Those decisions, coupled with the more extensive reasoning set out in the New York case law that they expressly rely upon, provide an ample basis for this Court to examine the drastic change in property rights suffered by the Zimans.

The State skirts the issue of a taking by physical occupation, arguing that

> "even though the Zimans undertook [their landlordship] with an intent that it be short-lived, petitioners upon purchase of occupied property willingly assumed responsibility for the rights of their tenants . . . ." Opp. 12.

This conveniently ignores the fact that, when the Twenty Year Law was enacted five months after the Zimans bought their home, the rights of their tenants were expanded so drastically that they destroyed the Zimans' statutory expectation of owner occupancy. Far from being "an inappropriate vehicle" (Opp. 13) for consideration of the due process and takings issues raised by this retroactive annulment of basic property rights, the instant case is clear opportunity for this Court to resolve those issues. By doing so, this Court would finally answer the basic question which it so suggestively left open in *Yee v. City of Escondido,* 503 U.S. 519 (1992); that is, the validity of a statute which "compel[s] a landowner over objection to rent or to refrain in perpetuity from terminating a tenancy." *Id.* at 528, *citing FCC v. Florida Power Corp.,* 480 U S. 245, 251-52 n.6 (1987); *Nollan v. California Coastal Commission,* 483 U.S. 825, 831-32 (1987); *Fresh Pond Shopping Center, Inc. v. Callahan,* 464 U.S. 875, 877 (1983) (Rehnquist, J., dissenting).

The State fares even worse on the issue of regulatory takings, where it claims that the Zimans failed to show a loss of "all economically beneficial use of their property". Opp. 12. This argument ignores the fact, affirmed in *Ziman I* on the basis of "unrefuted evidence", that the Zimans' landlordship cast them into financial hardship—a situation in which they were forced to remain for nearly eight years. 76 N.Y.2d 721, 557 N.Y.S.2d 876. This Court has itself pointed out that "the rhetorical force of our 'deprivation of all economically feasible use' rule is greater than its precision . . . ." *Lucas v. South Coastal Council,* 505 U.S. 1003, 1016 n.7 (1992). Even at its core, however, that rule almost certainly encompasses the